Supreme Court, U.S.
FILED

961257 NOV 12 1996

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

EDWIN WILLIAM BONNELL

Petitioner,

v.

AMTEX, INC.

Respondent.

Petition For Writ Of Certiorari
To the U.S. Court of Appeals
For the 11th Circuit

PETITION FOR WRIT OF CERTIORARI

Richard J. Tuneski
Counsel for the Petitioner
115 Summerfield Drive
Alpharetta, Georgia 30202
(770) 475-2090

3 HRP

QUESTIONS PRESENTED

1. Whether the actions of the District Court who after sanctioning the Appellant for his appeal from the original action before the Bankruptcy Court, then affirmed a judgement for additional sanctions filed in the Bankruptcy Court based upon the District Court Sanctions for the same conduct in the same action, 4 months after the original sanctions were rendered and 14 months after the case originally left the Bankruptcy Court?

2. Whether the actions of the Courts in this case violate the intent and the letter of the Federal Rule of Civil Procedure 11 ?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	ii
TABLE OF AUTHORITIES	iii-iv
PETITION FOR CERTIORARI	v.-vi.
OPINIONS BELOW	vi.
JURISDICTION	vi.
CONSTITUTIONAL PROVISIONS	vi.,1,2,3
STATEMENT OF THE CASE	3,4
ARGUMENT	4-18
CONCLUSION	18-19

TABLE OF AUTHORITIES

Cooter & Gell v. Hartmax Corp. 496 U.S. 384 (1990) 7,8,9,18

Doering v. Union County Bd. of Chosen Freeholders 857 F2d. 191 (3rd Cir. 1988) 7

Donaldson v. Clark 819 F2d. 1551 (11th Cir. 1987) 10,17,18

Grubb v. P.U.C. 281 U.S. 470 (1930) 15

Hoskin v. Yank 931 F2d. 42 (11th Cir. 1991) 9

In Re:Kunstler 914 F2d. 505 (4th Cir. 1990) 7

Mullane v. Central Hanover Trust 399 U.S. 306 (1950) 11

Zalvida v. City of Los Angeles 780 F2d. 823 (9th Cir. 1986) 6

ACTS

Bankruptcy Act of 1978 (28 USCS Sec. 147 (b) 4

FEDERAL RULES OF CIVIL PROCEDURE

FRCP 5	**12,13**
FRCP 8	**13**
FRCP 11	**5-14,16-19**
FRCP 13 (a)	**12**
FRCP 19	**13**
FRCP 20	**13**
FRCP 52	**14,16**
FRCP 54 (d)(2)(B)	**8**
Bankruptcy Rule 9011	**5,6,7,9**

IN THE UNITED STATES SUPREME COURT

EDWIN WILLIAM BONNELL

Petitioner,

v.

AMTEX, INC.

Respondent.

Petition For Writ Of Certiorari
To the United States Court of Appeals
For the 11th Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the 11th Circuit entered in the above styled case on August 12, 1996. In that decision, the Court let stand the decision of the District Court to affirm the placing of additional sanctions upon the Petitioner by the Bankruptcy Court in an action based upon the sanctions rendered by the District Court for the same conduct 4 months earlier and 14 months after the case had left the Bankruptcy Court. Said decision is clearly erroneous in light

of the Federal case law concerning the intent and implementation of Federal Rule of Civil Procedure 11 supported by the Fifth and Fourteenth Amendments to the Constitution of the United States.

OPINIONS BELOW

The Order of the Bankruptcy Court rendering additional sanctions is appears as Appendix A ("App A")

JURISDICTION

The Judgement of the Court of Appeals affirming the District Court was entered on August 13, 1996. The jurisdiction of this Court is invoked under 28U.S.C. 1257.

CONSTITUTIONAL PROVISIONS

Fifth Amendment of the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger; nor shall any person be subject, for the same offense, to be twice put in

jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment of the Constitution of the United States

Sect. 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within.

Sect.2 Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at an election for the choice of electors for President and Vice

President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and the citizen of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sect. 3 No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall having engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds

of each house, remove such disability.

Sect. 4 The validity of the public Debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be illegal and void.

Sect. 5 The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

The Petitioner appealed to the District Court from an order granting the Respondents a summary judgement without the benefit of a hearing. The District Court affirmed the ruling of the Bankruptcy Court in a de novo review again without a hearing. Thus, the Petitioner could not present witnesses and additional discovery which had been collected in depositions in New York state under a

contempt citation rendered against the Respondents by the Bankruptcy Court for the Southern District of New York for impeding Petition's discovery efforts. The Court of Appeals denied oral argument and affirmed the District Court adding additional sanctions by doubling the costs of the Appeal.

ARGUMENTS AND AUTHORITIES

COMES NOW, the Petitioner in the above styled action to present to this Honorable Court both argument and authorities in support of Petitioner's contention that the actions of the District Court were not simply an abuse of discretion but rather were clearly in contravention of the law.

The Bankruptcy Act of 1978 established in each federal district as an adjunct to the Federal District Court for the District, a United States Bankruptcy Court. The Bankruptcy Court as adjunct of the District Court was limited in its jurisdiction to those civil proceedings arising under Title 11 or arising in or related to cases under Title 11 (28USCS sec. 147 (b)). Furthermore in the 11th Circuit

today, the route of appeal from any decision of the Bankruptcy Court is through the District Court. There presently is no direct appeal to the 11th Circuit Court of Appeals. Consequently, rulings by the District Court on matters brought to that Court from the Bankruptcy Court in the appeal process are binding on the Bankruptcy Court. In the case which is the subject of this appeal, the District Court had rendered monetary sanctions upon the Petitioner in this case pursuant to Rule 11. The Respondent, four months after this sanction was rendered, filed a motion based upon Rule 9011 in Bankruptcy Court, for additional sanctions to be rendered allegedly for the attorneys fees requires to defend the Petitioner's alleged frivolous action in the Bankruptcy Court. The Bankruptcy Court then, citing as one of its basis for its decision, the original sanctions imposed by the District Court, imposed additional sanctions upon the Appellants counsel for an amount in excess of Seven Thousand Dollars. This decision by the Bankruptcy Court was made a full 18 months after the case had originally left the Bankruptcy Court. The Petitioner

contends that this exercise by the Bankruptcy Court was in violation of the requirements of Rule 11 and represents an exercise of judicial power not within purview of the Bankruptcy Court in this particular fact situation. That is not to say that under Rule 9011, the Bankruptcy Court doesn't have the power to impose similar Rule 11 sanctions, it does. But rather after the District Court had imposed sanctions, the purpose for the rule had been met and the actions of the Bankruptcy Court became punitive in violation of the intent of Rule 11. Rule 11 as written and interpreted by the Courts was designed simply to deter pleadings that are "frivolous, legally unreasonable, or without factual foundation, even though the paper was not filed in subjective bad faith'". Zaldivar v. City of Los Angeles 780 F.2d 823 (9th Cir. 1986).

Further, the Court opined that the Rule is violated only when it is patently clear that a claim has no chance of success. Ibid. However, when a District Court decides to award a monetary sanction as in this case, the total amount of the sanction as well as the initial decision to impose such

sanctions should be guided by equitable considerations. Doering v. Union County Bd. of Chosen Freeholders 857 F.2d 191,195(3rd Cir. 1988). Some of these factors as evidenced by case law in this area the Court should consider 1. the reasonableness of the opposing party's attorney's fees; 2. the minimum to deter; 3. the ability to pay; and finally factors relating to the severity of this violation of Rule 11. In Re: Kunstler 914 F.2d 505 (4th Cir. 1990)

Applying these factors to the present case one must conclude that the District Court had already judged the appropriate sanction to be applied in this case and so imposed it. Consequently, the subsequent imposition of additional sanctions by the Bankruptcy Court was punitive in nature and beyond both the intent and scope of Rule 11 or Rule 9011 when exercised by the Bankruptcy Court.

Another factor to be explored was the timeliness of the Bankruptcy Court's action. Although Rule 11 does not establish a deadline for the imposition of sanctions, the Advisory Committee did not contemplate there would be such a lengthy delay as exists in this case. Cooter & Gell v.

Hartmax Corp. 496 U.S. 384 (1990). Rule 11 provides for a "safe harbor" time frame which allows the alleged violator a chance to withdraw the offending pleading or allegation within a 21 day period after the party was provided notice but before the motion for said sanctions had been filed. Obviously, in this fact situation this option was not available has already imposed sanctions which were meant as a deterrent. Thus, the alleged offending conduct had been sanctioned. This should have ended the case.

Furthermore, Rule 11 provides that a party cannot delay serving its Rule 11 motion until after either the conclusion of the case or a judicial rejection of the offending contention. Such was the case here, the Respondents did not file with the Bankruptcy Court until four months after the District Court had rendered its sanctions. This also was a clear violation of Rule 11. Likewise, the Federal Rules provide in FRCP 54(d)(2)(B) that a motion for sanctions must be filed within 14 days of the entry of judgement. Again, the 4 months hiatus before filing its motion for the sanctions in the Bankruptcy Court, an adjunct of the

District Court, violated both the letter and spirit of Rule 11 since neither the language of Rule 11 nor the Advisory Committee's Note suggests that the Rule could not require payments for any activities outside the contest of a District Court Proceeding. Cooter & Gell. p.407.

In this case, the District Court had initiated a de novo review of the case before it imposed its sanctions. Consequently, an inferior Court would have no jurisdiction to review the same issues as the District Court, This fact brings us to the question of whether the doctrine of collateral estoppel might apply in this case. The 11th Circuit in Hoskin v. Yank 931 F2d. 42 (11th Cir. 1991) provided a precedent for the implementation of the doctrine in this Circuit. The Court in its review of the elements listed them as follows: The first element was that the issue at stake be identical in the prior litigation. Such was the case here as the Respondent's motion was based upon Rule 9011 and the action taken by the District Court when it imposed sanctions. Secondly, that the issue actually had been litigated in the prior litigation. The Respondent's motion to

the Bankruptcy Court was based upon the fact that the District Court had already imposed sanctions. So quite obviously this issue was litigated in the prior litigation. Thirdly, the Court opined that the determination of this issue in the prior litigation had been a central and necessary part of the judgement in the prior action. The facts show that it was. Finally, the 11th Circuit required that the relative burdens of proof be at least equal in each action. Since both actions were based upon Rule 11, the burdens of proof were in fact the same and the Courts are the same since the Bankruptcy Court is an adjunct of the District Court. Therefore, the conclusion must be that collateral estoppel applies in this fact situation. Whereupon, the action of the District Court affirming the ruling of the Bankruptcy Court must be held to be an egregious interpretation of the law and must be reversed. Finally, there must be some consideration given to both the due process aspects of a Rule 11 violation and the legislative purpose for the Rule. According to the 11th Circuit standard, Donaldson v. Clark 819 F.2d 1551,1558 (11th Cir.

1987), determining what process was due simply requires the application of the principles of due process. In this setting Donaldson p.1559 cited Mullane v. Central Hanover Trust Co. 339 U.S. 306 (1950) on what process is due:

> **"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all circumstances, to apprise interested parties of the pendency of an action and afford them an opportunity to present their objections."**

In the case before this tribunal, the District Court had originally imposed sanctions. The issue had thus been decided WITH FINALITY. The hearing which took place before the Bankruptcy Court was NOT A FAIR AND IMPARTIAL HEARING. The Court would not allow the Petitioner to argue his case limiting Petitioner to respond to issues which could not establish that the answer and counterclaim filed by the Appellant in this case did in fact meet the muster of Rule 11. The Bankruptcy Court's ruling implied that since the District Court had already imposed sanctions, the question of the Petitioner's liability was not an issue. In support of their ruling the Bankruptcy Court

listed seven (7) reasons for the imposition of additional sanctions none of which were even mentioned by the Court at the hearing or in the notice. Therefore, the Petitioner could not respond to them since Petitioner had no knowledge of their content. Of the 7 reasons listed by the Court, five had no bearing on nor were they covered by Rule 11. Of the five, we examined each of them starting number three. Number three factor for the imposition of sanctions was that the appellant filed a counterclaim against AMTEX,INC. when no facts existed. The fact is that the counterclaim was filed against COLIN OFFENHARTZ and NOT AMTEX,INC..FRCP 13 (a) defines a compulsory counterclaim as one that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim...." Such was the case here, since the fact in the counterclaim were never disputed. Service was achieved under FRCP 5 by serving local counsel with a copy of the counterclaim. Opposing Counsel then filed an answer to the counterclaim, NEVER DENYING HIS REPRESENTATION OF COLIN OFFENHARTZ. In addition to the allegations

made in the counterclaim pursuant to FRCP 8, the Appellant had witnesses to the transaction including but not limited to the Petitioner's New York Counsel, co-defendants in New York, Michael Zeger and Nancy Turner, Their Counsel, representatives from Marine Midland Bank and Barclay's Bank to list only a few of the witnesses that would support the Appellant's counterclaim. These witnesses were generated by discovery which was curtailed by the Court prior to the New York discovery being completed. This was due in no small part by the FLAGRANT FAILURE of the appellees to provide the discovery requested. This fact will be examined below. The second of the five factors was listed as three in the Court's order. That was that the Petitioner failed to serve and otherwise prosecute after seeking the Court's permission to do so. This allegation also in not a violation of Rule 11. The facts to this allegation were that the Petitioner filed a motion to add parties under FRCP 19 & 20. THE RESPONDENT NEVER OBJECTED, HENCE THE MOTION WAS GRANTED. Service was attempted under FRCP 5 without success. Petitioner, then after

reviewing the answer Petitioner had received from Opposing Counsel, concluded that he had service already under FRCP 13 and 5. The third of these factors was the allegation that the Petitioner had filed false dates on his certificates of service. This allegation represents one of the biggest stretches of logic by the Bankruptcy Court in its effort to justify its sanctions. First, the Petitioner categorically denies any such misdating. Further, this issue was never argued by the parties and is not supported by any evidence and of most importance. This CONDUCT IN NOT A VIOLATION of Rule 11. The next factor cited by the Court was that the affidavit of the Petitioner filed in the original action contained inaccurate and misleading statements. There are two replies for this allegation. In the first place, under FRCP 52, issues involving credibility are NORMALLY CONSIDERED QUESTIONS OF FACT for which testimony should be taken from witnesses. Without such evidence the Petitioner cannot be said to have received due process from the Bankruptcy Court. In this particular case, this decision was made arbitrarily and long after this case

had left that Court since it was not in the original appeal. It is important to note that there were NEVER ANY WITNESSES TESTIMONY IN THIS CASE. Secondly, as to this allegation, the original decision in this case rendered by the District Court is Res Judicata as to such allegations as made by the Bankruptcy Court in supporting its imposition of sanctions. For as the Supreme Court held in Grubb v. P.U.C. 281 U.S. 470 (1930); that a judgement on the merits in one action is Res Judicata where both the parties and the subject matter are the same, this applies not only to matters actually presented to sustain or defeat a right asserted but also as it respects any other available matter that might have been presented to that end. The last of the five factors used by the Bankruptcy Court to support its imposition of sanctions namely the Petitioner's counsel misrepresented to the Court, the status of the Petitioner's appeal to the 11th Circuit. This allegation again underlines the prejudice engendered by the Bankruptcy Court toward the Appellant. First, statements of the kind alleged to have been made by the Petitioner's counsel in open Court ARE NOT

COVERED BY RULE 11. (see notes of Rule 11) USCS. pp.134-136. Secondly, there was no attempt by the Appellant to misrepresent anything to the Bankruptcy Court or any other. Further, if there was under FRCP 52, such issues credibility create issues of fact. Such issues should be dealt with in an evidentiary hearing. However, there never was an evidentiary hearing in this case. This fact simply reinforces the Appellant's contention that the Bankruptcy Court throughout this case has not been an impartial obiter of the facts. Rather the Court has been adversarial since the time of Petitioner's first appeal from the Bankruptcy Court's order. Petitioner believes that most of this enmity stems from an ex parte letter sent to the Court by the Respondents New York counsel making baseless allegations against Petitioner's counsel in a style one could best characterize as a poison pen letter. There never was any attempt to substantiate any of the allegations. Consequently, the Petitioner believed that no one would give any credence to this improper and grievous breach of judicial procedure. The Petitioner apparently was mistaken.

In any case, the final two factors, listed by the Bankruptcy Court as factors which lead to the imposition of sanctions was that Petitioner failed to assert any legitimate defenses specially in light of the New York judgement in which the Bankruptcy Court alleges he admitted his acts in the New York Court. Here again Res Judicata applies as to the substantive issues in the District Court's judgement of this case and the time frames listed were certainly not complied with in regard to Rule 11. Finally, any collateral issues as to whether the Petitioner's attorney had abused judicial process were dealt with the District Court an Appellant contends that the doctrine of collateral estoppel would apply to this allegation.

The major goals of Rule 11 are basically to rid the Courts of meritless litigation and to reduce the growing costs and burdens of civil litigation. Donaldson p. 1559 The Court in Donaldson continued to opined that it would be counter productive if Rule 11 itself were to cause an increase in unnecessary litigation by mandating collateral procedures to act as prerequisites to the imposition of

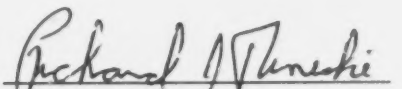
sanctions. Ibid. p.1559. Yet in this case we are faced with sanctions being imposed by the District Court and the Bankruptcy Court four months after the District Court awards imposing additional sanctions based upon the fact that the District Court had originally sanctioned the party. Clearly, this action by the Bankruptcy Court and the subsequent rubber stamp by the District Court contravenes the intent, purpose and letter of Rule 11. For Rule 11 is not a fee-shifting statute, policies which allow the District Courts to require the losing party to pay appellate, as well as District Court attorney's fees are not applicable. A Movant under Rule 11 has no entitlement to fees or an other sanction, and the contrary view can only breed appellate litigation. Litigation, Rule 11 was designed to stop. Cooter & Gell v. Hartmax Corp. 110 S.Ct. 2447 (1990).

CONCLUSION

Wherefore, the Petitioner contends that the initial sanctions imposed by the District Court, whether they were justified or not, ended the use of Rule 11. Since Rule 11 sanctions were met to deter Rule 11 violations.

Consequently, the Bankruptcy Court should be collaterally estopped from imposing additional sanctions. Especially in light of the fact that this collateral litigation is the direct result of the abuse of Rule 11 by the District Court. In addition, the factors cited by the Bankruptcy Court must be considered to be untenable as a matter of law. Similarly, the actions of the District Court by affirming the appeal cannot be viewed under the abuse of discretion standard. Rather, it must be viewed for what it is, namely a contravention of the law since the District Court thoroughly misapplied the law in the case thereby denying the Petitioner due process.

This 8th day of November 1996



Richard J. Tuneski,
Attorney for the Petitioner
Bar # 718625

115 Summerfield Drive
Alpharetta, Georgia 30202
770-475-2090

APPENDIX A

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 13 1996
MIGUEL J. CORTEZ
CLERK

No. 95-9608
Non-Argument Calendar

D. C. Docket No. 1:95-CV-0481

IN RE:

EDWIN WILLIAM BONNELL,

Debtor.

EDWIN WILLIAM BONNELL,

Plaintiff-Appellant,

versus

AMEX, INC.

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

Before DUBINA, CARNES AND BARKETT, Circuit Judges.

JUDGEMENT

This cause came to be heard on the transcript of the record from the Unites States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgement of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay defendant-appellee double costs on appeal to be taxed by the Clerk of this Court.

Entered: August 13, 1996
For the Court: Miguel J. Cortez, Clerk

By: Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 9/12/96

MC 1-4-95
Pltf Weaver
Deft Tuneski

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
	:	
EDWIN WILLIAM BONNELL,	:	**BANKRUPTCY CASE**
	:	**NO. A91-70587-WHD**
Debtor.	:	
_____	:	
	:	
AMTEX, INC.,	:	
	:	
Plaintiff,	:	**ADVERSARY CASE**
	:	**NO. 91-6681A**
v.	:	
	:	
EDWIN WILLIAM BONNELL,	:	
	:	**IN PROCEEDINGS UNDER**
	:	**CHAPTER 7 OF THE**
Defendant.	:	**BANKRUPTCY CODE**

ORDER

This matter comes before the Court on the Motion for Attorney Fees and Expenses filed in this proceeding on September 13, 1994, by the plaintiff Amtex, Inc. (hereinafter "Amtex"). By its Motion, Amtex requests that the Court sanction Richard J. Tuneski (hereinafter "Tuneski"), attorney for the debtor / defendant Edwin William Bonnell (hereinafter "Bonnell"), pursuant to Fed. R. Bankr. P. 9011.

The issues involved herein arise in a core proceeding over which this Court has jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I). The Court conducted a hearing on a Motion on November 8, 1994, after which time it took this matter under advisement. After carefully considering the briefs filed by the parties and the arguments made at the hearing, the Court will grant the Motion for the reasons stated in the discussion below.

DISCUSSION

Amtex commenced this proceeding against Bonnell in 1991 as a Complaint to Determine Non-Dischargeability of Debt. The basis of Amtex's claim was a judgement entered by a state court in New York which found that Bonnell, an employee and shareholder of Amtex, had embezzled funds.[1] Bonnell, through Tuneski as his attorney, filed an answer denying the allegations, and further filed a counterclaim seeking $50,000.00. In addition, Tuneski sought the permission of this Court to add additional parties as third party defendants.

---

[1] **The facts underlying this claim are set out in greater detail in this Court's Order dated February 17, 1993.**

The Court granted this request by Order dated July 28, 1992, but Tuneski failed to serve or otherwise add any additional parties.

On February 17, 1993 the Court entered summary judgement against Bonnell after finding that the New York state judgement and the doctrine of collateral estoppel established that the debt in question was excepted from discharge pursuant to 11 U.S.C.§523 (a)(4). The Court also found in favor of Amtex on Bonnell's counterclaim, finding that no facts existed, or were even alleged, to support the claim. Tuneski filed a motion for a new trial on behalf on Bonnell, which the Court denied. Subsequently, Tuneski filed an appeal, but the District Court issued an order affirming this Court's ruling.[2] Moreover, by Order dated July 20, 1994, the District Court denied Tuneski's motion for reconsideration and sanctioned Tuneski for advancing frivolous arguments during the case. Tuneski since has filed an appeal on behalf on Bonnell to the Eleventh Circuit Court of Appeals.

---

[2] Amtex, Inc v. Edwin William Bonnell, Case no. 1:93-CV-1248-MHS (N.D. Ga., Apr. 21, 1994).

In bringing this Motion before the Court, Amtex argues that the facts of this case show a history of attorney conduct that is clearly in violation of Rule 9011, which provides in pertinent part as follows:

> **The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; *and that it is not interposed for any improper purpose, such as to harass, or to cause unnecessary delay, or needless increase of the cost of litigation or administration of the case.* . . . If a document is signed in violation of this rule, the court on motion or on its own initiative, *shall* impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses occurred because of the filing of the document, including a reasonable attorney's fee.**

Fed. R. Bankr. P. 9011 (emphasis added). Amtex claims that Tuneski filed pleadings and advanced claims that had no chance for success under existing law and that he did so simply to hinder and delay the execution of the New York embezzlement judgement against his client. In opposing this

motion, Tuneski denies the frivolity of his defense and claims he simply was providing his client with the best representation possible.

As a general matter, this Court is not one that is predisposed to issue sanctions upon the occurrence of slight transgressions in judgement that may occur during the course of a case. Nevertheless, situations may arise where the Court, do to mandatory language of Rule 9011, must impose such sanctions. In the proceeding *sub judice*, the Court takes note of the existence of several troubling facts which call for a serious consideration of sanctions. These facts include, but are not limited to, the following: (1) failing to assert any legitimate defenses or colorable arguments while vigorously opposing Amtex's complaint, particularly in view of Bonnell's admission in the New York state court that he had committed the acts in question; [3]

---

[3] **For example, in opposing the earlier Motion for Summary Judgement, Tuneski claimed that, for purposes of collateral estoppel, no final judgment on the merits had been entered in the New York court. The facts and law, however, clearly showed otherwise.**

(2) filing a counterclaim against Amtex when no facts existed, or were even alleged, to support such a claim; (3) failing to serve and otherwise prosecute third party defendants after seeking and obtaining the permission of this Court to do so; (4) filing certificates of service containing false service dates; [4] (5) preparing and filing Bonnell's affidavit which contained inaccurate and misleading statements; (6) misrepresenting to the Court the status of Bonnell's appeal to the Eleventh Circuit; [5]

---

[4] One example of such conduct may be found in Bonnell's Motion for a New Trial. According to the certificate of service, Tuneski claimed he served the Motion upon Amtex March 1, 1993. In reality, the Motion was served on March 4, and Amtex did not receive it until March 8, thereby placing Amtex under considerable time constraints if it was to reply to the Motion within the time limits established by the Local Rules. Amtex alleges that this example is just one of many occasions in which Tuneski included false service dates on his certificates of service.

[5] In responding to the Motion currently before the Court, Tuneski claimed that this case was currently docketed in the Eleventh Circuit and under the jurisdiction of that court. As Amtex points out, however, Tuneski has only filed a notice of appeal from Judge Shoob's orders, but has not taken the necessary steps to complete the appeal, contrary to the time limits and requirements of the Federal Rules of Appellate Procedure. As such, it appears that no appeal to the Eleventh Circuit actually exists. Furthermore, whether such an appeal exists has little bearing upon the matters presently under consideration.

and (7) the finding by Judge Shoob in the District Court that Tuneski has acted improperly in this case in violation of Fed. R. Civ. P. 11.

Had the Court come across any one of these facts by itself, it likely would have dismissed it as an act of carelessness or oversight on the part of Tuneski. Considered in the aggregate, however, these facts require the Court to find that Tuneski has engaged in conduct in this proceeding for the improper purpose of harassment, causing unnecessary delay, and increasing the costs of litigation. The mandatory language of Rule 9011 requires this Court to issue sanctions, and Amtex requires sanctions in the amount of $16,442.00 to cover its attorneys' fees and costs. The Court, however, believes that the amount requested is too high in view of the facts and circumstances of this preceding. Instead, the Court concludes that $7,500.00 as partial reimbursement for Amtex's fees and costs is an appropriate sanction under Rule 9011.

The Court wishes it to be known that it takes no pleasure in issuing these sanctions. In a sense, the Court believes Tuneski when he claims he conducted himself in a

manner he saw necessary to represent his client's best interests. Nevertheless, a counsel's desire to represent his client's interest does not give him an unfettered right to file frivolous motions, make misleading arguments, and otherwise hamper and delay the administration of justice. Rule 9011 draws the line between appropriate conduct which represents a client's best interest and inappropriate conduct that is sanctionable. Regrettably, Tuneski has crossed that line.

CONCLUSION

Accordingly, in view of the many examples of improper conduct committed by Tuneski during the course of this proceeding, Amtex's Motion for Attorney's Fees and Expenses pursuant to Fed. R. Bankr. P. 9011 is hereby GRANTED. Tuneski is ordered to partially reimburse Amtex's attorney's fees and costs in the amount of $7,500.00.

IT IS SO ORDERED.

At Atlanta, Georgia, this 3 day of January, 1995.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE

Supreme Court, U.S.
FILED
MAR 13 1997
OFFICE OF THE CLERK

No. 96-1257

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

EDWIN WILLIAM BONNELL,

Petitioner,

v.

AMTEX, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

WILLIAM PAUL MASON
(Counsel of Record)
WEENER & MASON
1200 Ashwood Parkway
Suite 506
Atlanta, Georgia 30338
(770) 399-6450
Attorneys for Respondent.

Washington, D.C. • THIEL PRESS • (202) 328-3288

LIST OF PARTIES

Petitioner is Edwin William Bonnell.

Respondent is Amtex, Inc.

Page

TABLE OF CONTENTS

LIST OF PARTIES i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES . . . . . ii, iii

STATEMENT OF JURISDICTION. 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENTS 5

ARGUMENT:

I. The Bankruptcy Court Properly Imposed Sanctions Against Tuneski Pursuant To Rulle 9011 6

II. The Evidence In The Record Shows That The District Court Properly Affirmed The Bankruptcy Court's Award Of Rule 9011 Sanctions 8

III. The District Court Properly Imposed Sanctions Against Tuneski Pursuant To Rule 11 9

CONCLUSION 12

APPENDICES:

Appendix A – Third Unpublished Opinion of the Eleventh Circuit Court of Appeals, January 21, 1997 . . . . . 1a

Appendix B – Judgment. 3a

TABLE OF AUTHORITIES

Cases:

Bonnell v. Amtex, Inc., No. 95-9608 (11th Cir.) 4

Bonnell v. Amtex, Inc., No. 94-8906 (11th Cir.) 2

In re Armwood, 175 Bankr. 779 (1994). 6

In re Douglas, 141 Bankr. 282 (1992) 8

In re Terry, 294 F. Supp. 253 (Ga. 1968). 8

Cothran v. U.S., 45 Bankr. 836 (1984) 8

Cases, continued: Page

Didie v. Howes, 988 F.2d 1097 (11th Cir. 1993) 11

Fox v. Acadia State Bank, 937 F.2d 1566 (11th Cir. 1991) 10

Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 584 (9th Cir. 1986) 11

Matter of Crist, 460 F. Supp. 891 (Ga. 1978) 8

McGlamry v. Whitney Apartments, 147 Bankr. 619 . . . . . 7, 11

Ross v. City of Waukegan, 5 F.3d 1084 (7th Cir. 1993) 10

In re Whitney Place Partners, 123 B.R. 117 (1991) 7, 11

Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986) 6

Statutes:

Fed. R. Civ. P. 11 . . . . . *passim*

Fed. Bankr. R.P. 9011. . . . . *passim*

28 U.S.C. §1257. 2

28 U.S.C. §1254. 2

S. Ct. R. P. 10. 8

U.S. Const. Amend. V 7

U.S. Const. Amend. XIV. 7

No. 96-1257

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

EDWIN WILLIAM BONNELL,

Petitioner,

v.

AMTEX, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

COMES NOW AMTEX, INC., Respondent in the above styled petition for writ of certiorari, and files this Brief in Opposition. Petitioner seeks the reversal of an opinion of the Eleventh Circuit Court of Appeals, affirming a Bankruptcy Court's imposition of Rule 9011 sanctions, its affirmance in the United States District Court, and the United States District Court's imposition of Rule 11 sanctions.

STATEMENT OF JURISDICTION

Petitioner incorrectly cites that this Court has jurisdiction to hear this appeal under 28 U.S.C. 1257. This Court has jurisdiction to hear this appeal under 28 U.S.C. 1254.

STATEMENT OF THE CASE

On or about September 9, 1994, Respondent filed a Postjudgment Motion for Attorney's Fees pursuant to Fed. R. Bank. P. 9011.[1] In its Rule 9011 Motion, Respondent sought fees **related solely to its fees incurred with Petitioner's Bankruptcy.** Respondent sought fees of $16,442.00.

In response to Respondent's Motion, attorney for Petitioner, Richard J. Tuneski, ("Tuneski"), filed a belated Brief, again merely reciting facts from the underlying New York litigation. On November 8, 1994, the Honorable Homer Drake held oral argument on Respondent's Motion for Rule 9011 attorney's fees. During oral argument, Judge Drake admonished Tuneski on no less than two (2) occasions, and threatened Tuneski with contempt of court; all as a direct result of Tuneski's insistence on attempting to "retry the New York case."

---

[1] In an unpublished opinion dated May 25, 1995, the Eleventh Circuit Court of Appeals affirmed the United States District Court's grant of Rule 11 sanctions against Tuneski and the Bankruptcy Court's grant of Respondent's Motion for Summary Judgment. *Bonnell v. Amtex, Inc.*, No.: 94-8906. The Eleventh Circuit Court of Appeals also sanctioned Tuneski by ordering his payment of double costs of the appeal. The affirmance of the Motion for Summary Judgment confirmed an original New York Judgment against Petitioner in favor of Respondent in the approximate amount of $364,000.00.

On or about January 4, 1995, the United States Bankruptcy Court granted Respondent's Motion for Attorney's Fees pursuant to Rule 9011 related solely to Petitioner's bankruptcy filing. Judge Drake entered a lengthy Order granting Amtex's Motion and awarding $7,500.00 as partial reimbursement for attorney's fees. Judge Drake stated that although "the Court [was] not one predisposed to issue sanctions upon the occurrence of slight transgressions in judgment," the Court noted "several troubling facts which call for a serious consideration of sanctions."

Judge Drake specified at least seven (7) factors that contributed to the Court's determination that "Tuneski has engaged in conduct in th[e] proceeding for the improper purposes of harassment, causing unnecessary delay, and increasing the costs of litigation."[2] The Bankruptcy Court took no pleasure in issuing sanctions, but found that Tuneski did not have "an unfettered right to file frivolous motions, make misleading arguments, and otherwise hamper and delay the administration of justice."

---

[2] "(1) failing to assert any legitimate defenses or colorable arguments while vigorously opposing Amtex's Complaint, particularly in view of Bonnell's admission in the New York state court that he had committed the acts in question; (2) filing a counterclaim against Amtex when no facts existed, or were even alleged to support such a claim; (3) failing to serve and otherwise prosecute third party defendants after seeking and obtaining the permission of this Court to do so; (4) filing certificates of service containing false service dates; (5) preparing and filing Bonnell's affidavit which contained inaccurate and misleading statements; (6) misrepresenting to the Court the status of Bonnell's appeal to the Eleventh Circuit; and, (7) the finding by Judge Shoob in the District Court that Tuneski acted improperly in this case in violation of Fed. R. Civ. P. 11."

Tuneski appealed the imposition of Rule 9011 sanctions to the United States District Court. On November 14, 1995, the District Court found the Bankruptcy Court did not abuse its discretion and affirmed the Rule 9011 sanctions against Tuneski. Judge Shoob again found Tuneski's arguments frivolous. Judge Shoob found Petitioner was not denied his due process rights because he had "every opportunity to present both argument and evidence to the Bankruptcy Court as to why sanctions should not be imposed." The District Court also ordered Tuneski to show cause why additional sanctions under Rule 11 should not be imposed.

On January 25, 1996, the District Court imposed Rule 11 sanctions against Tuneski and awarded $2,364.18 in attorney's fees and costs related to Respondent's attorney's fees and costs incurred on the appeal of the Bankruptcy Court Order. Tuneski again appealed the District Court's Order to the Eleventh Circuit Court of Appeals.

In a second unpublished opinion dated August 13, 1996, the Eleventh Circuit Court of Appeals reaffirmed "the District Court's affirmance of the Bankruptcy Court's imposition of Rule 9011 sanctions, *as well as the District Court's imposition of Rule 11 sanctions. . . .*" (emphasis added). The Eleventh Circuit Court again imposed sanctions in the form of double costs against Tuneski. *Bonnell v. Amtex, Inc.*, No.: 95-9608.

Tuneski filed a third separate appeal to the Eleventh Circuit Court of Appeals on Judge Shoob's imposition of Rule 11 sanctions. In a third unpublished opinion dated January 21, 1997, the Eleventh Circuit Court of Appeals again affirmed the District Court and imposed sanctions in the form of double costs against Tuneski. (Appendix "A"). The Eleventh Circuit also instructed the Clerk to

forward copies of its 96-8313 opinion and its 95-9608 opinion to the Disciplinary Committee of the State Bar of Georgia.

SUMMARY OF ARGUMENTS

The Bankruptcy Court afforded Petitioner's attorney, Tuneski, notice and a hearing on Respondent's Motion for Attorney's Fees pursuant to Rule 9011 of the Bankruptcy Code. The hearing was continued on one occasion, thereby giving Tuneski additional time to prepare his defense of the Motion. The Bankruptcy Court had sufficient evidence of Tuneski's conduct that warranted sanctions under Rule 9011. The Bankruptcy Court had sufficient evidence of Tuneski's conduct to warrant awarded less in fees than Respondent sought.

The District Court did not abuse its discretion in affirming the Bankruptcy Court's award of attorney's fees to Amtex pursuant to Rule 9011. The District Court was obligated to affirm the Bankruptcy Court's findings of fact unless they were clearly erroneous.

The District Court did not abuse its discretion in awarding Rule 11 sanctions to Respondent against Petitioner's counsel, Tuneski. The District Court followed the procedure and mandates of Rule 11 in imposing sanctions against Tuneski.

ARGUMENT

I.

THE BANKRUPTCY COURT PROPERLY IMPOSED SANCTIONS AGAINST TUNESKI PURSUANT TO RULE 9011.

Tuneski's appeal carries a number of fundamental flaws: Tuneski ignores the fact that each Court sanctioned him for conduct in that Court, related solely to that specific proceeding; Tuneski had notice and the opportunity for a hearing on the Rule 9011 sanctions; by signing pleadings, Tuneski made certain representations under Rule 9011 and Rule 11; and, the rationale for Rule 9011 and Rule 11 has not deterred Tuneski from his abusive conduct.

Each of the sanctions imposed against Tuneski, and he has been sanctioned in every Court, resulted from conduct within the given Court in the given proceeding. Each Order was specific in detail about the conduct resulting in sanctions, and where and when that conduct occurred.

Tuneski correctly states that Rule 11 "was designed simply to deter pleadings that are 'frivolous, legally unreasonable, or without factual foundation....'" (Brief, p. 6, citing *Zaldivar v. City of Los Angeles,* 780 F.2d 823 (9th Cir. 1986). Neither Rule 9011 nor Rule 11 have deterred Tuneski from filing frivolous proceedings. Tuneski has marched forward, undaunted by the imposition of sanctions, through the federal appellate process. Tuneski could have stopped his assault on the judicial process at any juncture, but he elected otherwise.

The amount of sanctions should be set at a level to punish and deter future sanctionable conduct. *In re Armwood,* 175 Bankr. 779 (1994). While the sanctionable conduct may have occurred in different courts, unfortun-

ately for Respondent and the legal community, the sanctions have been unsuccessful in punishing and deterring Tuneski's conduct.

Tuneski cited the Fifth and Fourteenth Amendments as his applicable Constitutional Provisions. What Tuneski failed to acknowledge to this Court is that he received notice of the hearing before Judge Drake in the Bankruptcy Court and Tuneski appeared and argued at the hearing. Tuneski also failed to mention the hearing was continued on one occasion. Due process requires notice and the opportunity for a hearing; Tuneski received both from the Bankruptcy Court.

Tuneski filed a belated Brief in Opposition to Respondent's Motion for Rule 9011 Sanctions that simply recited arguments unsuccessfully espoused previously. At the November 8, 1994, hearing on Respondent's Motion for Rule 9011 attorney's fees, Judge Drake threatened Tuneski with contempt of court for Tuneski's insistence on attempting to "retry the New York case." Tuneski had every opportunity to present evidence and argument to Judge Drake. It was Tuneski's inability to utilize his due process rights that contributed to his sanctions, not the Bankruptcy Court's denial of his due process rights.

A Bankruptcy Court is authorized to examine the initial petition and all subsequent pleadings filed in the case in determining whether to impose Rule 9011 sanctions. *In re Whitney Place Partners,* 123 Bankr. 117 (1991), affirmed *McGlamry v. Whitney Apartments,* 147 Bankr. 619. Judge Drake examined the initial petition, the Counterclaim, third party claims, certificates of service, and Petitioner's affidavit. Judge Drake found that "several troubling facts" called for "serious consideration of sanctions."

It is within the Bankruptcy Court's discretion to impose sanctions only against counsel and not the party.

In re Douglas, 141 B.R. 282 (1992). Therefore, the Bankruptcy Court was well within its discretion in sanctioning Tuneski and not Petitioner.

With the underlying Bankruptcy concluded in August 1995 pursuant to the Eleventh Circuit Court of Appeals' initial opinion, Respondent filed a Postjudgment Motion for Attorney's Fees pursuant to Fed. R. Bank. P. 9011 on September 9, 1995. Respondent's Motion for Rule Sanctions was timely. Respondent could not have moved the Bankruptcy Court for Sanctions until the initial Bankruptcy proceeding was concluded, and the conclusion occurred by virtue of an Order from the Eleventh Circuit Court of Appeals.

II.

THE EVIDENCE IN THE RECORD SHOWS THAT THE DISTRICT COURT PROPERLY AFFIRMED THE BANKRUPTCY COURT'S AWARD OF RULE 9011 SANCTIONS.

A District Court is bound by the Bankruptcy Court's findings of fact unless they are clearly erroneous. *Cothran v. U.S.,* 45 Bankr. 836 (N.D. Ga. 1984); *Matter of Crist,* 460 F. Supp. 891 (Ga. 1978); *In Re Terry,* 294 F. Supp. 253 (Ga. 1968).

Tuneski again presents a due process argument in oppositon to the District Court's affirmance of the Bankruptcy Court. On his appeal to the District Court, Petitioner was not entitled to the same due process considerations as in the initial stages.

The Bankruptcy Court Order imposing Rule 9011 sanctions was lengthy and went into factual detail regarding Tuneski's conduct. Judge Drake noted "several troubling facts which call for a serious consideration of sanctions."

The District Court did not abuse its discretion in affirming Judge Drake's Order. The District Court was bound to accept the Bankruptcy Court's findings of fact unless it determined they were clearly erroneous. The District Court previously experienced similar sanctionable conduct from Tuneski when he appealed the original Bankruptcy Court grant of summary judgment.

The District Court did not abuse its discretion in affirming the Bankruptcy Court's imposition of Rule 9011 sanctions. The District Court's review of the Bankruptcy Court Order does not rise to the level sufficient to grant a petition for writ of certiorari under Supreme Court Rule 10.

III.
THE DISTRICT COURT PROPERLY IMPOSED SANCTIONS AGAINST TUNESKI PURSUANT TO RULE 11.

In part, Federal Rule of Civil Procedure 11 states:

(1) **(B) On Court's Initiative.** On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A). Monetary sanctions may be awarded against a represented party for a violation of subdivision (b)(2).

(B). Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) **Order.** When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

In the District Court's November 14, 1995, Order affirming the Rule 9011 sanctions, the Court ordered Tuneski "to file a Brief within twenty (20) days of the date of entry of th[e] Order showing cause why the Court should not impose sanctions against him pursuant to Fed. R. Civ. P. 11." The District Court was very specific about Tuneski's sanctionable conduct, and the November 14, 1995, Order satisfies the mandates of Fed. R. Civ. P. 11 (1) (B).

An award of sanctions pursuant to Rule 11 will be set aside only if the District Court abused its discretion. *Fox v. Acadia State Bank,* 937 F.2d 1566 (11th Cir. 1991); Fed. R. Civ. P. 11. The determination of whether Rule 11 has been violated is "very fact-based," and sanctions are "mandatory" when Rule 11 has been violated. *Ross v. City of Waukegan,* 5 F.3d 104 (7th Cir. 1993); Fed. R. Civ. P. 11.

A cursory review of Tuneski's analysis of both the Bankruptcy Court's imposition of sanctions and the District Court's imposition of sanctions shows that Tuneski has no concept of legal analysis. Tuneski incorrectly states Petitioner's Counterclaim in the Adversary Pro-

ceeding in Bankruptcy Court "was filed against Colin Offenhartz and not Amtex, Inc." (Petitioner's Brief, p. 12). Colin Offenhartz was not the Plaintiff in the underlying Adversary Proceeding; it was Respondent, Amtex, Inc. Tuneski's failure to follow the basic precepts of civil procedure resulted in the imposition of sanctions.

Tuneski's signature on pleadings constitutes certain representations to the Court. Fed. R. Civ. P. 11(b). The District Court and the Bankruptcy Court found Tuneski's representations false.

Tuneski's conduct violated Rule 11. Once the District Court found a violation of Rule 11, it was required to impose sanctions and those sanctions should not be overturned. *Didie v. Howes,* 988 F.2d 1097 (11th Cir. 1993); *In re Whitney Place Partners,* 123 Bankr. 117 (1991), affirmed *McGlamry v. Whitney Apartments,* 147 Bankr. 619. Rule 11 was enacted to deter such dilatory or abusive pretrial tactics, and the District Court's sanctions should be upheld. *Golden Eagle Distributing Corp. v. Burroughs Corp.,* 801 F.2d 584 (9th Cir. 1986). The District Court examined Respondent's counsel's Affidavits, found the fees and costs reasonable, and imposed sanctions.

The District Court timely served its show cause Order. The District Court *sua sponte* can impose Rule 11 sanctions, and the District Court followed the requirements of Rule 11. The District Court gave Tuneski the opportunity to show cause why Rule 11 sanctions should not be imposed; Tuneski presented nothing.

The District Court did not abuse its discretion in awarding Rule 11 sanctions in favor of Respondent and against Tuneski. Just as with Tuneski's last appeal, the

District Court took careful heed of his Brief and could not "discern any issues that appear to be warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." *See* Fed. R. Civ. P. 11(b)(2).

The District Court did not make any erroneous factual findings or misapply Rule 11. Tuneski's appeal to this Court is a further attempt to bludgeon Respondent with abusive tactics. The petition for writ of certiorari should not be granted.

CONCLUSION

This Court should deny Petitioner's petition for writ of certiorari; in doing so, it would send a message from the highest Court in this land that such conduct will not be tolerated.

This 13th day of March, 1997.

Respectfully submitted,

WILLIAM PAUL MASON
Georgia Bar No.: 475710

Attorney for Respondent, AMTEX, INC.

WEENER & MASON
1200 Ashwood Parkway
Suite 506
Atlanta, Georgia 30338
(770) 399-6450

APPENDIX A

[Filed JAN 21 1997]

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8313
Non-Argument Calendar

D.C. Docket No. 1:95-CV-0481-MHS
BK No. 91-AD-96681

IN RE:

EDWIN WILLIAM BONNELL,

Debtor.

EDWIN WILLIAM BONNELL,

Plaintiff-Appellant,

versus

AMTEX, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(January 21, 1997)

Before ANDERSON, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

This is the third time we have considered in this court matters related to sanctions imposed against appellant Edward William Bonnell's attorney, Richard J. Tuneski ("Tuneski"). In an unpublished opinion filed on May 25, 1995, we affirmed the district court's grant of Rule 11 sanctions against Tuneski and the bankruptcy court's grant of appellee Amtex's ("Amtex") motion for summary judgment. We also sanctioned Tuneski and ordered the payment of double the amount of Amtex's costs of the appeal.

In a second unpublished opinion filed on August 13, 1996, we affirmed the district court's affirmance of the bankruptcy court's imposition of Rule 9011 sanctions as well as the district court's imposition of Rule 11 sanctions. For a second time we imposed sanctions in the form of double costs against Tuneski.

In the present case, it appears from the record that Tuneski has filed a separate appeal of the district court's judgment on the Rule 11 sanctions which has already been addressed and affirmed by this court. See *Bonnell v. Amtex, Inc.*, No. 95-9608 (11th Cir. August 13, 1996). We reaffirm the district court's judgment finding Tuneski's conduct sanctionable. Moreover, we again direct the clerk of this court to tax double costs against Tuneski for prosecuting this yet another frivolous appeal. We further direct the clerk to send a copy of this opinion, as well as our previous opinion, entered in No. 95-9608, to the Disciplinary Committee of the State Bar of Georgia.

AFFIRMED.

APPENDIX B

[Filed JAN 21 1997]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8313
Non-Argument Calendar
District Court Docket No. 1:95-CV-0481

IN RE:

EDWIN WILLIAM BONNELL,

Debtor.

EDWIN WILLIAM BONNELL,

Plaintiff-Appellant,

versus

AMEX, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

Before ANDERSON, DUBINA and BLACK, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the

Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED that attorney, Richard J. Tuneski, pay to defendant-appellee, double costs on appeal to be taxed by the Clerk of this Court.

Entered: January 21, 1997
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Dander
Deputy Clerk

ISSUED AS MANDATE: 2/21/97